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Addendum StartPage: 0

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**APPLICATION OF §
SOUTHWESTERN ELECTRIC §
POWER COMPANY FOR §
AUTHORITY TO CHANGE RATES §**

**PUBLIC UTILITY §
COMMISSION OF TEXAS**

EAST TEXAS SALT WATER DISPOSAL COMPANY'S REPLY BRIEF

COMES NOW, East Texas Salt Water Disposal Company ("ETSWD") and files this Reply Brief regarding Southwestern Electric Power Company's ("SWEPCO") rate increase application.

I. Introduction/Summary [Preliminary Order ("PO") Issues 1, 2, and 3]

The record includes unchallenged, quantified data showing that usage across customer classes has materially changed since the appearance of COVID-19, and SWEPCO acknowledges that current data continues to show that usage across customer classes has not reverted to the data measured prior to the emergence of COVID-19 and relied upon in calculating its customer class cost of service.¹ As such, the cost allocations and billing determinants that appeared in the original SWEPCO Application² in this Docket cannot produce just and reasonable rates as required under Section 36.003 of the Public Utility Regulatory Act ("PURA").³ The burden of correcting this deficiency and offering just and reasonable rates falls not on intervenors,⁴ but on SWEPCO as the applicant who is seeking a material increase in its rates based on data compiled prior to COVID-19.⁵ ETSWD urges the Commission to require SWEPCO to update its customer class cost of service studies and billing determinants with the most current available data in order to account

¹ Tr. at 1496: 20 - 1497: 1 (Cross-examination Burnett Rebuttal).

² SWEPCO Ex. 1 (2020 SWEPCO Rate Filing Package). The 2020 SWEPCO Rate Filing Package is referred to as the "Application" hereinafter.

³ Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-66.016 (West 2007 & Supp. 2014) (PURA).

⁴ Cf. Commission Staff's Initial Brief at 78 (contending that ETSWD as an intervenor is obliged to provide the needed data related to changes in SWEPCO's customer usage and billing determinants, instead of SWEPCO as the applicant utility).

⁵ PURA § 36.006

6034

for the effects of COVID-19 and, to the extent that they exist, the effects of the March 2 Governor's Order⁶ and any effects of vaccinations, etc. on the alleged "return to normal."

V. Billing Determinants [PO Issues 4, 5, 6, 54]

SWEPCO has not met its burden of proving that its customer class cost of service study and corresponding billing determinants adequately reflect actual usage on its system. Like all rate cases, SWEPCO as the applicant utility has the burden of proving that the inputs that it uses will produce just and reasonable rates. However, while some hope for an eventual return to normal at some undefined point in the future, there is consensus that the current environment, as measured by data in SWEPCO's possession related to customer usage by class, does not comport with that relied upon in the customer class cost of service or billing determinants incorporated into the Application.

In a proceeding involving a proposed rate change, *the electric utility has the burden of proving* that: (1) the rate change is just and reasonable, if the utility proposes the change... ."⁷

This burden cannot be shifted onto an intervenor, like ETSWD, simply because that intervenor highlights the outdated character of a key input like customer class usage data.⁸ ETSWD challenged the reasonableness of SWEPCO's customer class cost of service study with evidence. The record in this proceeding clearly and unequivocally shows that the customer class cost of service study relied upon in SWEPCO's Application no longer matches reality. For example, SWEPCO testified to this fact during the hearing as witness Mr. Burnett explained that current data show that customer usage does not match that before COVID-19.⁹ It is incumbent on SWEPCO to overcome ETSWD's challenging evidence in order to carry its burden of proof. Yet SWEPCO has not only failed to produce any evidence overcoming the evidence provided by ETSWD, but the challenging evidence itself came from SWEPCO through discovery and cross

⁶ See Southwestern Electric Power Company's Initial Brief ("SWEPCO Brief") at 110 (referencing Executive Order GA-34, issued on March 2, 2021 ("March 2 Governor's Order"))

⁷ PURA § 36.006.

⁸ Cf. Commission Staff's Initial Brief at 78 (opposing an update to the customer class cost of service and billing determinants not because the facts are incorrect, but because "ETSWD does not provide the information necessary to make the adjustment to SWEPCO's CCOS") (emphasis added).

⁹ Tr. at 1496: 20 - 1497: 1 (Cross-examination Burnett Rebuttal).

examination. Thus, on an evidentiary basis SWEPCO cannot fulfill its statutory burden of proof on this issue.¹⁰

ETSWD wholeheartedly agrees with SWEPCO's observation that a "pro forma adjustment is intended to ensure that test year data better represents a utility's ongoing operations."¹¹ No party has contended that the old data relied upon in the Application's customer class cost of service study and billing determinant measurements accurately represent the present day or foreseeable future. And while it testifies to a hope that trends could eventually return customer class usage to that forecasted in the Application,¹² SWEPCO's hope does not come with supporting data or a timeline. At the very least, using the most current available data to update the customer class cost of service study and billing determinants would provide actual proof of what SWEPCO claims to be occurring on its system.¹³ Moreover, if, as SWEPCO has argued,¹⁴ that the March 2 Governor's Order terminating any state-ordered COVID-19 related limitations renders the changes to usage patterns moot, an updated customer class cost of service study will confirm this. So, the existence of the March 2 Governor's Order is not a relevant reason not to update the study.

SWEPCO has updated other aspects of its Application in this Docket under the premise of using the most current information and accounting for COVID-19, and this logic should similarly apply to the customer class cost of service study and billing determinants. For example, "[o]n rebuttal, due to the fluid market conditions resulting from the COVID-19 pandemic, Mr. D'Ascendis updated his ROE analyses as of March 31, 2021."¹⁵ The ROE resulting from this case will last until the next rate case, just as the billing determinants and customer class cost of service study. If SWEPCO's ROE can be updated to account for COVID-19 effects, then the same logic

¹⁰ See *supra* notes 25-26.

¹¹ SWEPCO Brief at 111.

¹² SWEPCO Brief at 110.

¹³ See SWEPCO Brief at 110 (citing SWEPCO witness Mr. Burnett's unquantified assertion that the "narrative has flipped" as of April 2021).

¹⁴ *Id.* (referencing the March 2 Governor's Order as proof that the dislocations to energy consumption brought on by COVID-19 were all magically lifted by a state order from three months ago despite self-evident data that people continue to work from home).

¹⁵ SWEPCO Brief at 35 citing Rebuttal Testimony of Dylan D'Ascendis, SWEPCO Ex. 38 at 6:4-5. See also SWEPCO Brief at 52 (criticizing Wal-Mart's ROE witness for failing to make updates to account for COVID-19).

requires the update of other aspects of the Application, including the billing determinants and the customer class cost of service.

“A rate *may not be unreasonably preferential*, prejudicial, or discriminatory but must be sufficient, equitable, and *consistent in application to each class of consumer*.”¹⁶ Nonetheless, the Office of Public Utility Counsel (“OPUC”) improperly asks the Commission to show preferential treatment for one class of customer over another in the context of needed COVID-19 related updates to the customer class of service.¹⁷ OPUC anticipates that an update to the customer class of service study will show heightened adverse effects on large industrial customers.¹⁸ Absent an update to the customer class of service study, OPUC’s thesis cannot be proven right or wrong. However, much more fundamentally, backing into a result with the intention of treating customer classes differently from one another conflicts with PURA §36.003(b) and cannot serve as the basis for a failure to use more current and accurate information.

Tellingly, SWEPCO, OPUC, and Commission Staff continue to argue against ETSWD’s secondary position in this case (a known and measurable adjustment) rather than addressing ETSWD’s actual primary argument that the customer class cost of service study should be fully updated. ETSWD’s primary argument always has been to utilize all available data to conduct a new customer class cost of service study, not to simply rely on the incomplete information provided by SWEPCO in its response to ETSWD 3-2.¹⁹ Actual data should be used to update the SWEPCO customer class of service studies and, consistent with Commission precedent, unsubstantiated speculation should not be used. OPUC interestingly relies on the Commission’s order in Docket No. 50227, which was a Certificate of Convenience and Necessity (“CCN”) proceeding related to a power plant project with a multi-decade life. “The ALJs stated in the Proposal For Decision (“PFD”) that ‘[w]hile COVID-19 has since caused significant disruptions to economic and other human activity, whether this will lead to material reductions in EPE’s long

¹⁶ PURA §36.003(b).

¹⁷ Office of Public Utility Counsel’s Post-Hearing Initial Brief (“OPUC Brief”) at 28.

¹⁸ *Id.*

¹⁹ Direct Testimony of Kit Pevoto, ETSWD Ex. 1 at 5. *See also*, Tr. at 1393-4 (Cross-examination Narvaez Cross-rebuttal) (ETSWD eliciting acknowledgement by Staff witness Mr. Narvaez that his concerns related to reliance on ETSWD 3-2 do not apply if updated data is used to bring the customer class cost of service and billing determinants up to date). Yet these parties continue to argue against a proposal that fundamentally differs from ETSWD’s primary recommendation on this topic. *See, e.g.*, Commission Staff’s Initial Brief at 76-9.

term demand remains no more than speculation.”²⁰ ETSWD noted the fundamental differences between a retail rate case and a CCN proceeding in its Initial Brief, and there is no need to repeat that fundamental distinction. However, even if one were to accept OPUC’s contention that the order in Docket No. 50227 serves as precedent for this Docket, that order supports ETSWD’s call for the use of *actual and current data instead of speculating* about whether society eventually will return to its behaviors before COVID-19. Actual data and record testimony in this Docket show that usage behavior has not returned to the pre-COVID-19 behavior applied in the SWEPCO Application and pre-COVID test year.²¹ Asking the Commission to assume that “work from home” and other changes in behavior driven by COVID-19 will cease because of governmental orders that do not and cannot address workplace changes driven by the private sector requires unsupported speculation of exactly the sort criticized in the PFD in Docket No. 50277.²² No one has offered data or quantification to support the idea that behavior is going to reverse and begin emulating that from the 2019 test year. To the contrary, the record and its actual data show that usage among customer classes has not reverted to that assumed in the 2019 test year. As such, ETSWD asks the Commission to instruct SWEPCO to update its customer class of service studies in order to compute rates based on current usage patterns that more closely resemble the environment in which the rates will be charged.

Equally noteworthy, OPUC did not cite the sentence in the Docket No. 50227 PFD just below the one it chose to cite, “It is equally plausible that the impact [of COVID-19], if any, will be in shifting class consumption rather than lowering demand.”²³ The Commission has noted the potential for COVID-19 to affect class consumption before, and consistent with ETSWD witness

²⁰ OPUC Brief at 29 (*quoting Application of El Paso Electric Company to Amend its Certificate of Convenience and Necessity for an Additional Generating Unit at the Newman Generating Station in El Paso County and the City of El Paso*, Docket No. 50277, Proposal for Decision (Sept. 13, 2020)).

²¹ See, e.g., Direct Testimony of Kit Pevoto, ETSWD Ex. 1 at KP-3 (SWEPCO’s response to do discovery in which SWEPCO reports its billing determinants through December 31, 2020 were down by 3.1%, commercial was down 4.3% and industrial by 6.9%); Tr. at 1496: 20 - 1497: 1 (Cross-examination Burnett Rebuttal) (SWEPCO now possesses data showing that usage patterns have not returned to pre-COVID behaviors and the data reported in KP-3 are the most current in the record presently).

²² SWEPCO describes its belief that usage across customer classes will return to pre-COVID levels as an “expectation” but offers no analysis or quantification to support this speculative “expectation.” See SWEPCO Brief at 110.

²³ Docket No. 50277, PFD at 24.

Ms. Pevoto's recommendation, the best way for the Commission to determine whether COVID-19 has caused a shift in class consumption is for the Commission to order SWEPCO to update its customer class of service studies with the most current data available.²⁴

SWEPCO has the burden of proving that the rate change it is requesting is just and reasonable under PURA § 36.006. This burden applies to all aspects of SWEPCO's Application, including the billing determinants and customer class cost of service studies. However, the burden of production shifts when another party proposes a change to the Application. It is then incumbent on the challenging party to produce credible evidence that its proposal is more reasonable than SWEPCO's.²⁵ Once that presumption is rebutted, the burden falls on SWEPCO as the utility to prove, by a preponderance of the evidence, that the challenged proposal is prudent.²⁶ ETSWD met its burden of production as it challenged the billing determinants and customer class cost of service studies by producing SWEPCO's own data showing material changes in usage across customer classes and in billing determinants.²⁷ Consistent with *Entergy Gulf States, Inc.*, this returns the burden of production to SWEPCO, and SWEPCO offered no quantifiable evidence to prove that the billing determinants and customer class cost of service studies included in the Application remain indicative of current usage on the SWEPCO system. Consequently, SWEPCO has failed to refute ETSWD's contention that the billing determinants and customer class cost of service studies in the Application are now obsolete.

Known and measurable adjustments can be made at any point in the course of a rate case proceeding. SWEPCO incorrectly suggests that known and measurable adjustments made at the time of the Application are by themselves adequate and exhaustive.²⁸ In fact, SWEPCO itself has made adjustments since the time of the Application. For example, SWEPCO made adjustments to

²⁴ Direct Testimony of Kit Pevoto, ETSWD Ex. 1 at 5.

²⁵ *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 46449, Order on Rehearing (Mar. 19, 2018) at CoL 9A.

²⁶ *Entergy Gulf States, Inc. v. Public Util. Comm'n*, 112 S.W. 3d 208, 214-15 (Tex. App.-Austin 2003, pet. denied).

²⁷ See, e.g., Direct Testimony of Kit Pevoto, ETSWD Ex. 1 at KP-3; ETSWD Ex. 3 (SWEPCO's May 2021 Twitter post related to the safe provision of service to those who continue to work from home).

²⁸ SWEPCO Brief at 110.

address the closures of certain businesses during the COVID-19 pandemic only after these closures were highlighted by ETSWD witness Ms. Pevoto.²⁹ Nothing in Commission Rules or PURA limit the Commission's right to require known and measurable adjustments at any stage of a rate case. To the contrary, courts have found that "[t]he Commission may, in its discretion, go outside the test year when necessary to achieve just and reasonable rates that will more accurately reflect the cost of service that is apt to apply to the utility in the future."³⁰ As described above, the record in this Docket is replete with evidence that the old billing determinants and customer class cost of service studies in the original Application do not reflect the future as customers on the SWEPCO system continue to feel the effects of COVID-19 on their electricity usage.

VI. Functionalization and Cost Allocation [PO Issues 4, 5, 52, 53, 55, 56, 57, 58]

B. Class Allocation [PO Issues 53, 58]

Consistent with the analysis and discussion of billing determinants related to Section V above, ETSWD asks the Commission to order SWEPCO to update its customer class cost of service studies and to incorporate the updated results for purposes of class allocation.

XI. Conclusion

Whereas, premises considered, ETSWD hereby recommends that the Commission approve SWEPCO's proposed customer class cost of service study in accordance with the modifications described herein. SWEPCO has not demonstrated that it is utilizing properly updated customer class usage data to address the quantifiable effects of COVID-19 in shifting usage away from commercial and industrial classes and toward the residential class. Additionally, consistent with basic cost causation principles, the Commission should not assign any transmission costs attributable to industrial customers with behind-the-meter generation to customers outside of the class that do not possess behind-the-meter generation themselves.

²⁹ SWEPCO Brief at 115. "In responding to discovery from ETSWD, SWEPCO determined that pro forma adjustments to Test Year load and customer data related to the loss of three large industrial customers were not properly reflected in the as-filed jurisdictional production and transmission demand allocations. SWEPCO included these adjustments in its rebuttal jurisdictional cost of service study, resulting in a slight decrease to the jurisdictional production allocation and a slight increase to the jurisdictional transmission allocation." *Id.*

³⁰ *Southwestern Public Service Co. v. Pub. Util. Comm'n of Tex.*, No. 07-17-00146-CV (Tex. App.-Amarillo 2018) (citing *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 188 (Tex. 1994)).

Respectfully submitted,

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ATTORNEYS FOR EAST TEXAS SALT
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served by email, facsimile, hand-delivery, overnight delivery, or 1st Class U.S. Mail on all parties of record in this proceeding on July 1, 2021.

/s/ Todd F. Kimbrough